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Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

H. E. MOSS & COMPANY, owner of the S. S. *Lucellum*,
Petitioner,

against

GRACE PULEO, as Administratrix of the Estate of
PETER PULEO, Deceased,
Respondent,

and

TODD SHIPYARD CORPORATION, successor by merger to
ROBINS DRY DOCK & REPAIR COMPANY,
Respondent.

CROSS PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

H. E. Moss & Company respectfully prays for a writ of certiorari to review a final decree in admiralty of the Circuit Court of Appeals for the Second Circuit, entered on February 20, 1947, which affirmed in part a decree of the District Court against H. E. Moss & Company, and which reversed the said decree in part. The Circuit Court held, accordingly, that Todd Shipyard Corporation was, primarily, and H. E. Moss & Company, secondarily, liable to respondent, Puleo, in the sum of $35,059.76, on account of the death of an employee of Todd Shipyard Corporation.

Statement of the Matter Involved.

Todd Shipyard Corporation has already filed and there is presently before the court, its petition for certiorari in respect of that part of the decision of the Circuit Court of Appeals which reversed the decree of the District Court. (October Term, 1946, No. 1329) The present petition is being filed by H. E. Moss & Company in order to obtain a review of that part of the Circuit Court's decision which affirmed the District Court's decree, in the event that the petition of Todd Shipyard Corporation should be granted. If the petition of Todd Shipyard Corporation should be denied, H. E. Moss & Company will not ask that the present petition be granted.

The deceased was an employee of Todd Shipyards Corporation, as successor of Robins Drydock & Repair Company. On July 1, 1941, while working in a tank on H. E. Moss & Company's oil tanker, S.S. *Lucellum, which was* lying in navigable waters in the yard of Todd Shipyard Corporation, he was fatally burned. The fire which burned the deceased was caused when the deceased brought the open flame of a burning torch into contact with gasoline fumes. These fumes were caused to enter the tank where the deceased was working when other employees of Todd Shipyard Corporation opened up the vessel's pipe lines by removing a drain plug from the bottom of a valve. R. 270

It was alleged on behalf of the deceased's widow that H. E. Moss & Company was in control of the vessel at the time of the accident, and was liable for not giving the deceased a safe place in which to work. R. 26, 33. H. E. Moss & Company asserted that it was not in control of the vessel at the time of the accident, since it had parted with such control when it delivered its vessel to Todd Shipyard Cor-

poration, and that, accordingly, it did not have any duty to give the deceased a safe place in which to work. Two of the judges of the Circuit Court, Judges Learned Hand and Clark, ruled that the law of the State of New York, and not the maritime law as declared in Federal decisions, was applicable in determining whether H. E. Moss & Company was in control of the vessel, and had duties dependent on such control. R. 272. They also found that, according to the law of the State of New York, H. E. Moss & Company was in control of the vessel and, therefore, owed the deceased a duty to make the place of work safe. R. 272. In so doing, they deliberately put to one side, as not authoritative, Federal Court decisions which required a different result. R. 272. As authority for this ruling, the majority of the court relied on 16 U. S. Code, Sec. 457, known as the Conservation Act, which provides as follows:

> "Sec. 457. Action for death or personal injury within national park or other place under jurisdiction of United States; application of State laws
>
> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be. Feb. 1, 128, c. 15, 45 Stat. 54."

A dissenting judge, Judge Swan, ruled that the maritime law, as declared in the Federal Court decisions already

referred to, was applicable in determining this question and that, according to this law, H. E. Moss & Company had bailed its vessel to Todd Shipyard Corporation for the purpose of repairs, had parted with possession and control, and did not have any duty to make the place of work safe for Todd Shipyard Corporation's employees. R. 275, 276.

Basis for Jurisdiction.

The jurisdiction of this court to entertain this petition and to grant the same is provided by Section 347A of Title 28 of the U. S. Code.

Question Presented.

1. Whether the Conservation Act, 16 U. S. C. Sec. 457, requires that the duty and liability of a shipowner for a maritime tort—i.e., negligence resulting in death—be determined by principles of law declared in state court decisions rather than by the different principles of maritime law, as declared in Federal court decisions.

Opinions of the Courts Below.

The District Court rendered an opinion. R. 240. This is reported at 66 F. Supp. 78. The Circuit Court also rendered an opinion. R. 269 to 275. This is reported at 159 F. (2d) 842. The dissenting opinion of Judge Swan appears at R. 275 to 277, and at 159 F. (2d) 847.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court is in conflict with the decisions of this court in *Robins* v. *Dahl,* 266 U. S. 449

and *Garrett* v. *Moore-McCormack Company, Inc.*, 317 U. S. 239.

2. The decision of the Circuit Court has led to confusion and uncertainty respecting the law applicable, not only in cases involving death, but also in cases involving personal injury.

3. If the Conservation Act (16 U. S. C. 457) requires that State law apply in determining duties and liabilities in respect of injuries occurring on navigable waters, it would seem to follow that the right of longshoremen to recover under the maritime law, as declared in the case of *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85, is in serious doubt. If the state law had been applicable, there would have been no recovery for Sieracki from the shipowner.

4. The present case provides an appropriate occasion for clarifying the law.

It is respectfully submitted, therefore, that, if the court should grant the petition for certiorari of Todd Shipyard Corporation in respect of the question as to the construction of the contract of indemnity involved in this case (October Term, 1946, No. 1329), the court should also grant H. E. Moss' present petition with respect to the questions referred to herein.

Respectfully submitted,

RAYMOND PARMER,
VERNON SIMS JONES,
Proctors for H. E. Moss & Company, Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946

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H. E. MOSS & COMPANY, owner of the S.S. *Lucellum*,
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PETER PULEO, Deceased,
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and

TODD SHIPYARD CORPORATION, successor by merger to
ROBINS DRYDOCK & REPAIR COMPANY,
Respondent.

BRIEF IN SUPPORT OF CROSS PETITION.

The facts are set forth clearly in the opinion of Judge Learned Hand, who wrote the majority opinion below. R. 265-269.

The S.S. *Lucellum*, on which the accident happened, had been delivered to Todd Shipyard Corporation, pursuant to the provisions of a contract which had been made between Todd Shipyard Corporation and United States of America. R. 38, 249 H. E. Moss & Company was not a party to that contract. R. 38 Instead, it was the intended third party beneficiary. R. 48

In circumstances such as these, where a shipowner makes a contract with a repair yard for repairs on his own ship, and thereafter delivers the vessel to the repair yard for the purpose of having the repairs done, the vessel is thereafter in the custody and control of the repair yard, and not in the custody and control of the shipowner.

Pan-American, etc. v. *Robins,* 281 F. 97 at 107;
I. M. M. etc. v. *W. & A. Fletcher Co.,* 296 F. 855;
U. S. v. *Newport News Shipbuilding & Dry Dock Co.,* 21 F. (2) 112;
Lackritz v. *Petersen,* 31 F. Supp. 415;
The Gladys, 49 F. Supp. 780;
Gucciardi v. *Chisholm, et al.,* 145 F. (2) at 514.

In the latter case, the court said, at page 516:

> "A general contractor having control and custody of a vessel undergoing repairs would seem to be in a position analogous to that of an owner".

Accordingly, legal principles which control the liability of a shipowner to the employees of an independent contractor, such as a stevedore, whom the shipowner invites on a vessel of which he remains in occupancy and control, have no application to this case. As indicated above, it is the repair yard which, in this instance, is the occupier of the premises.

If the law, as declared in the foregoing cases, had been enforced herein, H. E. Moss & Company would not have been held liable in the first place. The deceased would not have been considered as the business guest of H. E. Moss & Company, and, therefore, H. E. Moss & Company would not have owed the duty for the violation of which liability was fastened on H. E. Moss herein. R. 276, 277.

The Circuit Court disregarded the foregoing decisions as not authoritative, and did so solely by reason of the provisions of the Conservation Act, 16 U. S. C. 457, which provides as follows: (R. 272)

> "Sec. 457. Action for death or personal injury within national park or other place under jurisdiction of United States; application of State laws
>
> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be. Feb. 1, 1928, c. 15, Stat. 54".

The navigable waters of the United States are not subject to the exclusive jurisdiction of the United States in the sense that a national park is subject to such jurisdiction. A national park is subject to the exclusive jurisdiction of the United States acting as the exclusive sovereign. The navigable waters of the United States are subject to the joint sovereignty of the States and the United States. State law is applicable until Congress excludes it.

It is submitted that the intent of the Conservation Act was to make state law applicable only in those national areas which otherwise would be subject only to Federal law because they are subject to the exclusive sovereignty of the United States. Thus, it has no application to navigable

waters which are subject to the joint sovereignty of the United States and the States.

The Conservation Act was passed in 1928. At that time this court had already held that it was unconstitutional for Congress to delegate to the States its legislative power with respect to matters affecting the maritime law. *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149 (1920). Although the decision in the Stewart case has been the subject of severe criticism, it is not to be supposed that Congress could have intended in 1928, only eight years after the Stewart case was decided, to include navigable waters, along with national parks, as one of the places governed by the Conservation Act. In those days uniformity of the maritime law was regarded as necessary, or, at least, desirable.

So far as national parks and similar areas are concerned, uniformity may not have any importance at all. However, if the Conservation Act has application to navigable waters, it is the end of all possibility of uniformity.

It would seem that the decision below flies in the face of the current trend of decision. This court in the case of *Sieracki* v. *Seas Shipping Company,* 328 U. S. 85, held that longshoremen, under the maritime law, may recover from shipowners if they are injured because of the unseaworthiness of the vessel even in the absence of any negligence of the shipowners. This, as maritime law, is, supposedly, uniform throughout the country. However, it is not the law of any state independently of the maritime law. If the Conservation Act is to be construed as making state law applicable to the exclusion of maritime law, as the Circuit Court has done in this case, it is not conceivable how a longshoreman's rights under the maritime law, as declared by this court, may be preserved.

The dissenting judge, Judge Swan, applied the maritime law to the case below and reached the result that, since Todd Shipyard Corporation was in control of the vessel, and H. E. Moss & Company was not, H. E. Moss & Company was not liable for the breach of any duty because it did not have any duty to the deceased which could be breached. R. 275, 276, 277. This was the correct result.

Since H. E. Moss & Company, although held liable to the deceased's estate, obtained a decree for full indemnity from Todd Shipyard Corporation by reason of the provisions of the repair contract, it does not have any present financial interest in seeking rectification of the foregoing erroneous holding of the Circuit Court. However, if this Court should grant Todd Shipyard Corporation's petition for certiorari in respect of the contract of indemnity, H. E. Moss & Company would then have a present financial interest in seeking such rectification.

Conclusion.

In the event that this court should grant Todd Shipyard Corporation's petition for certiorari in October Term, 1946, No. 1329, the petition of H. E. Moss & Company for certiorari should also be granted, the decree of the Circuit Court and the District Court should be reversed, and the libel dismissed.

Respectfully submitted,

Raymond Parmer,
Vernon Sims Jones,
Counsel for H. E. Moss & Company,
Petitioner.